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No. 83-2166

IN THE
Supreme Court of the United States
October Term, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

Cases: **Page:**

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 2, 4, 9

Central Hudson Gas & Electric Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) 2, 5, 9

In re Primus,
436 U.S. 412 (1978) 6

In re R.M.J.,
455 U.S. 191 (1982) 2, 4, 5, 9

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 4

NAACP v. Button,
371 U.S. 415 (1963) 6

Village of Schaumburg v. Citizens for a Better Environment,
444 U.S. 620 (1980) 5

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 3

Other Authorities:

FTC, *Staff Report on Improving Consumer Access To Legal Services: The Case For Removing Restrictions on Truthful Advertising*,
(November 1984) 3

Ohio Civil Rule 11 5

Rule 11, Fed. R. Civ. P. 5

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REPLY BRIEF OF APPELLANT

In defending the discipline imposed by the Ohio Supreme Court, appellee advanced nine separately numbered arguments in its brief. Several points can be grouped together, and others merit no reply. We set forth below our response to the remaining arguments of appellee.

1. At the beginning and end of its brief (Points I and IX), appellee observes that appellant did not challenge the rules under which he was found guilty for publishing his Dalkon Shield ad before he ran the ad, and that he "could and should have" gone to the federal court to test the constitutionality of those rules, rather than first publishing his ad. Presumably, although not stated expressly, appellee's conclusion is that "therefore appellant is precluded from raising his constitutional defense in this proceeding." If that is appellee's conclusion, it is plainly wrong; if it is not, its arguments are simply irrelevant.

The notion that appellant is "precluded" from relying on the First Amendment as a defense to these disciplinary charges is wholly refuted by this Court's decisions in *Bates v. State Bar of*

Arizona, 433 U.S. 350 (1977), and *In re R.M.J.,* 455 U.S. 191 (1982). In both of those cases the attorneys first engaged in the activities which violated the state's advertising rules and then successfully raised their First Amendment claims as defenses to disciplinary proceedings. Similarly, to the extent that appellee argues, as it does in the heading to Point III of its brief, and again on page 33, that attorneys must obey all rules "IN THE ABSENCE OF CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHTS TO THE CONTRARY," that argument is also answered by those decisions.

Moreover, the argument overlooks the fact that appellant made repeated efforts to find out whether his Dalkon Shield ad was proper, and he believed, incorrectly as it turned out, that the disciplinary authorities would not act against him following this Court's ruling in *In re R.M.J.* (J.A. 15-16; T. 197-98, 208-12). Finally, when appellant met with members of appellee's staff, there was no hint that the portion of his Dalkon Shield ad dealing with contingent fees was a problem, nor is there any suggestion that he was advised before running his ad that the Disciplinary Counsel believed that his ad constituted improper solicitation. Thus, even if a preclusion argument might be proper in some case, it has no place in this one.

2. In a number of places, principally in Points II and IV, appellee observes that Ohio's Code of Professional Responsibility was adopted to protect the public. We agree. However, such "protections" must also pass muster under the requirements of the First Amendment, and neither appellee nor the Ohio Supreme Court seems to have recognized that this is not simply a question of whether the rules are reasonable, rational, or even wise or unwise, but whether they satisfy the four-part test for regulating commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980). And that test mandates that the State take into account the public's need for the information being suppressed.

Appellant recognizes that "selling" legal services is not the same as selling ordinary commercial products or services. But despite such differences, the central message of this Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976), seems to have been lost on appellee:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. *Cf. Parker v. Brown,* 317 U.S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense the justifications Virginia has offered for suppressing the flow of prescription drug information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

Thus, the particular vice of the rules under challenge on this appeal is that they fail to take any account of the genuine need that the public has for both general and specific information about the availability of legal services and possible solutions to problems that lawyers may provide.[1] Stated another way, these rules assume that, if any possible misuse can be made of information in an ad, the state may flatly prohibit it. That view, quite simply, is not consistent with the First Amendment.

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[1] A recently issued Staff Report of the Federal Trade Commission provides further evidence that consumers benefit from lawyer advertising through lower prices and increased competition. FTC, *Staff Report On Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (November 1984).

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3. In the opening sentence of Point III of its brief, appellee states that it is "not possible to consider attorney advertising as something separate and apart from solicitation" (Br. 6). We agree that advertising is simply one way in which lawyers solicit business, but that does not provide an answer to this First Amendment challenge. For if all advertising is a form of solicitation, and since this Court has upheld for-profit "solicitation" in *Bates* and *R.M.J.*, then there is nothing *per se* objectionable about solicitation such that the mere incantation of the word takes the case out of the First Amendment.

To the contrary, as the decisions of this Court make clear, the proper inquiry is whether the type of conduct at issue is the kind which the state may properly prohibit because of the substantive harms to its citizens that may arise from it. And to answer that question, the courts must look at the rule allegedly violated and the conduct giving rise to the violation. Thus, as this Court did in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), a court must inquire into whether the potential harms appear likely, and should not speculate about what a state might or might not do in a vast array of cases not then before the court. Because the Dalkon Shield ad published by appellant involved none of the substantive evils which the state may properly prohibit, such as the in-person solicitation of a recent accident victim in a hospital condemned in *Ohralik*, it may not be the basis for disciplining him.

4. In its only effort to identify a substantial state interest which would justify these broad restrictions on advertising, appellee, for the first time in this litigation, argues that Ohio's chief concern is to "prevent . . . the bringing of non-meritorious lawsuits against persons who might be sued by lawyers who solicit clients" (Br. 3, 13). We do not dispute that deterring frivolous litigation is a valid state objective. However, for at least three reasons, this justification cannot support the discipline imposed on appellant or indeed any broad restrictions on advertising.

First, it is difficult to understand the basis for Ohio's conclusion that there is any correlation between the bringing of non-meritorious cases and the sort of advertising at issue here. Not

only is there absolutely no evidence in the record, or elsewhere for that matter, to support such a conclusion, but such a conclusion is at odds with the realities of contingent fee litigation, which typically turns on an attorney's assessment that there is a substantial likelihood of prevailing prior to the initiation of any legal action, or as appellee put it, whether "there is a factual basis and [the] applicable law [governing the case] is reasonably debatable . . ." (Br. 14). In any event, appellee's total failure to furnish any support for this alleged correlation is, standing alone, an adequate basis for the Court to reject this argument. *See In re R.M.J.*, 455 U.S. at 202, 204-205; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 568-72; *cf. Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-639 (1980).

Second, appellee has failed to even attempt to meet its burden of proof and show that these prohibitions directly advance the goal of discouraging frivolous litigation. This is not surprising, however, since the advertising prohibitions go far beyond that goal and, as this case illustrates, would plainly deter meritorious litigation – such as the 95 Dalkon Shield cases filed as a result of appellant's ad.

Moreover, appellee overlooks the fact that the courts have ample, less sweeping tools at their disposal, which are directly aimed at combatting frivolous litigation. Suits for abuse of process and/or malicious prosecution are available where the facts warrant such charges. The courts of Ohio, as well as those in the federal system, have rules which provide sanctions for attorneys who bring frivolous actions. Ohio Civil Rule 11; Fed. R. Civ. P. 11. And surely Ohio could discipline any attorney who repeatedly filed actions adjudged to be vexatious or brought in bad faith. Given this clear ability to protect against lawyers who abuse the judicial process by direct, less restrictive, means, appellee's attempt to justify its sweeping advertising restrictions on these grounds must be rejected.

Finally, to the extent that appellee is suggesting that the First Amendment allows a lawyer to promote himself and state the areas of law in which he works, but does not allow him to advertise for clients for specific cases, with known defendants, that

argument is supported by neither logic nor authority. Thus, in *NAACP v. Button*, 371 U.S. 415 (1963), the solicitation for civil rights plaintiffs was quite specific, and in *In re Primus*, 436 U.S. 412 (1978), the solicitation was directed at finding plaintiffs to institute an action against a single doctor, yet this Court overturned the restrictions in both cases. Moreover, since consumers often rely on advertising to fill information voids, it turns the First Amendment on its head to say that the information in appellant's ad is entitled to less protection because it was *more* specific, and hence more useful to the reader, than a general ad announcing a lawyer's availability to handle personal injury cases arising from defective medical devices.[2]

5. Appellee also argues in Point IV that lawyer advertising should not only be judged by whether it is false or misleading, but also by whether an ad may be "confusing" (Br. 11). It is not at all clear what difference there is between those standards for constitutional or any other purposes. But, more importantly, appellee never attempts to demonstrate that the Dalkon Shield ad is confusing.

Nor could it have succeeded if it had tried. The illustration is admittedly accurate, the basic message about possible litigation over injuries resulting from using the Dalkon Shield is clear and not disputed, and the only aspect of the ad which the Ohio

[2]A.H. Robins Company, the manufacturer of the Dalkon Shield, has filed an *amicus* brief, purportedly to clarify the stipulated record in this case with respect to the allegedly defective nature of the Dalkon Shield. We will not recite the evidence demonstrating that the Dalkon Shield has been associated with a number of serious medical problems, but instead refer the Court to the Addendum of this brief, which sets forth a reproduction of a typical advertisement recently published by Robins as part of its massive media campaign to warn women still using the device that it "is important that each Dalkon Shield be removed, since there is substantial medical opinion that its continued use may pose a serious personal health hazard."

We also draw the Court's attention to the fact that in its efforts to assure that all women who are still using the Shield read and understand its advertisement, in which it offers to pay for medical treatment in removing the Shield, Robins used an illustration of the Shield, which appears to be virtually identical to the illustration used by appellant.

Supreme Court found objectionable is the portion relating to contingent fees. While appellant believes, for reasons set forth at pages 37-43 of his opening brief and in the following section of this reply, that those objections cannot be sustained under the First Amendment, appellee's argument based on possible confusion would add nothing to its existing defense of the finding of misconduct relating to the contingent fee portion of the Dalkon Shield ad. Accordingly, even if appellee were correct in its premise, the addition of "confusing" to the list of possible bases for imposing discipline could not justify the decision below.[3]

6. In his opening brief, appellant made two constitutional arguments regarding the charges that he made inadequate disclosures concerning his contingent fee arrangement. The first was that there was no evidence that there was any need for the kind of detailed affirmative disclosure requirement that the Ohio Supreme Court has imposed for all advertisements for contingent fee cases. As to that, appellee's only response has been to make broad and unsupported assertions in its brief on the desirability of such information:

> Members of the public cannot be presumed to know what is meant by 'contingent fee.' Most people would not know, for example, that under most contingent fee arrangements there can be substantial expenses incurred by the client (Br. 18-19).

There is simply no basis for such claims, either in the evidence or the findings of the Ohio Supreme Court. Indeed, appellee never even attempted to prove those assertions at trial. Nor is there any suggestion that any of appellant's clients were unaware of the full extent of their obligation at the time when

[3]As to the Dalkon Shield illustration, far from being confusing as appellee suggests in Point VII, the uncontested evidence is that the illustration was essential in catching the attention of the reader and in conveying the message that this particular IUD was the one which may have caused injuries to the women who had used it (T. 54-55, 176-79). In addition, one of appellant's expert witnesses testified that deleting the illustration "would probably make the written words confusing" (T. 162).

such information was most needed – when they entered into a fee agreement with appellant. Accordingly, the factual foundation for such an assertion cannot be sustained.

Appellant's second argument was that the affirmative disclosure requirement was ill-suited to combat any substantive abuses in the area of contingent fees which the state might lawfully control. In reply, appellee agreed with the criticism of Ohio's rules, but defended the decision below on the ground that "attorneys have an obligation to abide by those rules that *are* law, not the ones they would prefer to be the law" (Br. 19, emphasis in original). The difficulty with that argument, like so many others in appellee's brief, is that it has overlooked the fact that this is a First Amendment case and that under this Court's decisions such as *Bates, Central Hudson,* and *R.M.J.*, a far closer relationship between substantive goals and suppression of commercial speech must exist before the Ohio Supreme Court's disclosure rules on contingent fees can be upheld.

7. In its defense of the finding of misconduct on the drunk driving ad (Point VIII), appellee admits that the theory on which the Board found appellant guilty was different from the one on which appellee proceeded (Br. 27). Nonetheless, appellee argues that the decision can be upheld because appellant knew that his drunk driving ad was the subject of these charges and was advised of the rule on which the Board and Court relied. According to appellee, that is all that due process requires.[4]

However, there are several serious due process problems which were discussed in Point II of appellant's opening brief, to which appellee has not responded. This is not simply a case in which an attorney was advised of the conduct and the rule under which he was to be charged. Rather, the disciplinary authorities here explained in detail their theory of the alleged violation, both before and at trial (J.A. 23 ¶ 3; Tr. 14). By not even suggesting any alternative theory, appellee affirmatively led appellant to believe that the original theory was the only one on which he had to defend his drunk driving advertisement.

[4]Appellee's suggestion that the Ohio Court's finding that the ad was "misleading and deceptive" "could incorporate either the Board's or Appellee's rationale as to why the rule [sic] violated DR 2-101(A)" (Br. 22) is nothing but speculation, and as such is no answer to appellant's due process claim.

The problem that the change in theories produced here is far from being a theoretical one, but had real practical consequences to the defense. If appellant had known in advance the basis on which he was ultimately found guilty, he surely would have offered evidence regarding the actual practices at the Municipal Courts and the understanding of his advertisement by those who responded to it (and perhaps by experts and others). More importantly, appellant would have testified about his intentions concerning this ad, instead of having the Board find him guilty based upon its own speculations about what he would or would not have done in certain circumstances. While it is true, as appellee argues, that appellant was afforded the opportunity to present evidence and actually did so (Br. 27), it is equally true that he had no realistic opportunity to respond to the charge on which he was disciplined, as opposed to the one relied on by appellee.

There is a further problem to which appellee has made no response at all: the Board took judicial notice of what it claimed to be the practice at the Municipal Courts as the basis for a finding of attorney misconduct. The question in this Court is not, as appellee suggests (Br. 28), whether judicial notice in those circumstances was proper as a matter of Ohio law. Rather, the pertinent inquiry is whether the Due Process Clause allows a state to impose discipline on an attorney based solely on records which have not been offered in evidence, nor made available to the attorney, nor of which he was even apprised before his trial was completed. Indeed, to this day, appellant has no idea what "reports" the Board was describing, since even when his objection was clearly stated in his brief to the Ohio Supreme Court, no one filed with the Ohio Supreme Court, or even specifically identified, the "reports" which formed the basis of this charge. The Due Process Clause simply does not allow a finding of attorney misconduct based on such "non-evidence."

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For the foregoing reasons, as well as those set forth in appellant's opening brief, the decision and order below should be reversed, and the charges of misconduct dismissed.

Respectfully submitted,

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December 1984

ADDENDUM

Advertisement of the A.H. Robins Company
November 7, 1984 *The Columbus Dispatch*

An Important Health Warning To Women Using An IUD

If you are still using an intrauterine birth control device (IUD) inserted in the early to mid 1970s, this message is for you. Many women had an IUD called the Dalkon Shield inserted during that time. It is important that each Dalkon Shield be removed, since there is substantial medical opinion that its continued use may pose a serious personal health hazard. If you are still using a Dalkon Shield, A. H. Robins Company will pay your doctor or clinic to remove it.

A. H. Robins ceased distribution of the Dalkon Shield in 1974. Many claims have been made that the device causes health problems, including pelvic infections, that may result in serious injury or death. In 1980, A. H. Robins advised doctors to remove the Dalkon Shield from any woman still using it. In 1983, the U.S. Food and Drug Administration and other government agencies issued the same advice based on their concern about pelvic infections among Dalkon Shield users.

The Dalkon Shield

A. H. Robins will pay your doctor or clinic for any examination needed to find out if you are using the Dalkon Shield. If you are, A. H. Robins will pay the cost of having it removed.

WHAT TO DO

If you know you are using a Dalkon Shield IUD, or if you are using an IUD inserted in the early to mid 1970s and are unsure of the kind, call your doctor or health clinic for an appointment. Your call will be in confidence, and there will be no cost to you.

If you have further questions, please call A. H. Robins Company toll free. The number is **1-800-247-7220.** (In Virginia call collect **804-257-2015.**)

A·H·ROBINS
1407 Cummings Drive, Richmond, Virginia 23220